

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**KHALID SHEIKH MOHAMMED,
WALID MUHAMMAD SALIH MUBARAK
BIN ‘ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM AL
HAWSAWI**

D-___

**Defense Motion
For Appropriate Relief:**

Order Granting Access to View and Inspect the
Conditions of Confinement in GTMO

12 September 2008

1. **Timeliness:** This motion is timely filed pursuant to the procedure afforded by the Rules for Military Commissions (R.M.C.). *See* R.M.C. 905(b)(4).
2. **Relief Sought:** Defense counsel for Mr. Ramzi bin al Shibh, respectfully request that the Commission enter an Order allowing the defense to view and inspect the conditions under which Mr. bin al Shibh has been and continues to be confined during his incarceration at Guantanamo Bay, Cuba (GTMO). ■
3. **Overview:** To assist the defense in the preparation and presentation of evidence at the R.M.C. 909 competency hearing in this capital case, the defense submitted a request to JTF-GTMO to be granted access to view and inspect Mr. bin al Shibh’s detention cell. The request was made so the defense could properly investigate the effects that the conditions of confinement have had, and continue to have, on Mr. bin al Shibh’s mental capacity, both competency to stand trial and to make a counsel election. JTF-GTMO did not provide the defense the access it sought. In reliance upon the fundamental fairness of these proceedings, as well as any and all rights afforded Mr. bin al Shibh under the Due Process, Effective Assistance of Counsel, and Cruel and Unusual

Punishments clauses of the Fifth, Sixth and Eighth Amendments to the Constitution of the United States, the defense comes now to the Commission seeking relief.

4. **Burden and Standard of Proof:** As the moving party, the defense bears the burden of establishing that it is entitled to the requested relief. *See* R.M.C. 905(c)(2)(A). “The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.” R.M.C. 905(c)(2).

5. **Facts:**

a. **September 2006:** By order of the President of the United States, Mr. bin al Shibh was transferred from the custody of the Central Intelligence Agency to GTMO for detention by the Department of Defense (DoD). At all times subsequent thereto until present, Mr. bin al Shibh has remained incarcerated in GTMO under DoD custody.

b. **24 April 2008:** [REDACTED] JTF-GTMO, provided an indoctrination brief to detailed defense counsels (CDR Lachelier and LT Federico) regarding the detention program under which Mr. bin al Shibh was held. Detailed defense counsel were then required to sign an acknowledgement they received this brief. It was explained that the signing of the acknowledgement was required before detailed defense counsels would be permitted to first meet their client.

c. **9 May 2008:** The Convening Authority referred charges against Mr. bin al Shibh for a joint trial before military commission. The charges were referred capital.

d. **5 June 2008:** Mr. bin al Shibh and his co-accused were arraigned. During the arraignment, Mr. bin al Shibh stated the following in response to a question from the Military Judge: “We are here in Guantanamo, we’re still in the black site. And I and myself, I cannot sleep at night or during the day because there’s a lot of noise or annoyance they’re causing to us, because the temperature is very, very cold, you cannot sleep in your cell. And because officials at the place of our incarceration do not respond to our demands at all. And they tend to annoy us or bother us all the time. And because the place I sleep on the bunk, it’s always shaking automatically, constantly.” *Transcript of Hearing ICO United States v. Mohammed, et.al.*, 5 June 2008 (Draft), pg. 123.

e. **24 June 2008:** The government provided to the defense a Medication Summary for Mr. bin al Shibh. *See* **D-017**, Attachment B.¹ This summary documents that Mr. bin al Shibh was taking [REDACTED] on the date of his

¹ This Summary was previously filed with the Commission; It is not attached hereto to reduce duplication in the record. Upon request, it can/will be provided to the Military Judge for consideration.

arraignment, including [REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]. See D-017, Attachment C.

g. 16 July 2008: The government provided the defense with redacted³ copies of DoD medical records of Mr. bin al Shibh detailing the medical care, diagnosis, and treatment provided to him during the time he has been in DoD custody in GTMO. The records [REDACTED]

k. **26 August 2008:** The prosecution provided to the defense summaries of medical records concerning the medical care, treatment, and diagnosis during the time Mr. bin al Shibh was in the custody of the CIA. These summaries were

⁴ See fn. 1, fn. 2.

approved by the Military Judge during an *ex parte, in camera* review, as adequate substitutes to the full, unredacted records. *See* Order of the Commission, dated 19 August 2008.

l. **9 September 2008:** The prosecution notified the Commission that two physicians, [REDACTED]

[REDACTED] had been appointed to conduct the 706 Inquiry. Both [REDACTED] arrived in GTMO that day.

m. **10 September 2008:** [REDACTED] sent an email to the Military Judge, copying the Commission Clerk of Court, requesting an Order to have access to view Mr. bin al Shibh at his place of detention.

n. **11 September 2008:** The Military Judge ordered the prosecution to immediately inquire into the request of [REDACTED]. Less than three hours later, the prosecution responded that [REDACTED] will be taken to the accused's location "with the full cooperation of the command at JTF-GTMO." That afternoon, [REDACTED] were permitted to enter the detention facility and see Mr. bin al Shibh in his cell.

6. Law and Argument:

I. MR. BIN AL SHIBH SUFFERS FROM A MENTAL DISEASE OR DEFECT WHICH MAY BE SEVERELY AFFECTED BY HIS CONDITIONS OF CONFINEMENT IN GTMO

a. The Commission has already recognized that Mr. bin al Shibh's competency is at issue in this case. *See* MJ 006. During the arraignment on 5 June, Mr. bin al Shibh directly demonstrated to the Military Judge his belief that his living environment is being manipulated by the JTF-GTMO guard staff:

We are here in Guantanamo, we're still in the black site. And I and myself, I cannot sleep at night or during the day because there's a lot of noise or annoyance they're causing to us, because the temperature is very, very cold, you cannot sleep in your cell. And because officials at the place of our incarceration do not respond to our demands at all. And they tend to annoy us or bother us all the time. And because the place I sleep on the bunk, it's always shaking automatically, constantly.

See Transcript of Hearing ICO United States v. Mohammed, et al., 5 June 2008

(Draft), pg. 123.

⁵ The defense was advised by the prosecution a week prior, once the government identified the physicians to conduct the 706 inquiry. This notice was a professional courtesy extended by the prosecution so the defense could plan to assist in the process, as needed. However, no appointment letter was ever provided.

b. For several years, DoD physicians diagnosed Mr. bin al Shibh with [REDACTED]. See **D-017**, Attachment G; *see also Declaration of* [REDACTED], pg. 12 [**Attachment A**]. The medical records from JTF-GTMO thoroughly document that the [REDACTED] [REDACTED] may have occurred as a result of his exposure to the conditions of prior and current periods of confinement. *See Id.* At the center of the DoD physicians' diagnosis that Mr. bin al Shibh suffers from [REDACTED] [REDACTED] [REDACTED] [REDACTED]. *See Id.*

c. Undoubtedly, Mr. bin al Shibh and other “high value” detainees in GTMO are subject to prolonged isolation, as “isolation was built into the system in Guantanamo.” PHYSICIANS FOR HUMAN RIGHTS, “Break Them Down: Systematic Use of Psychological Torture by US Forces,” (May 2005), pg. 3. Isolation includes being without meaningful social and environmental stimulation or significant, if any, family contact. The Commission must acknowledge and appreciate the complexity of a mental health analysis of a young man who has experienced living in such an environment as there is ample “psychological literature concerning the ill effects of solitary confinement.” *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988). In fact, numerous studies have concluded that extended periods of detention in such conditions can cause significant psychiatric harm and the absence of social and environmental stimulation has been found to lead to a range of mental health problems, ranging from insomnia and confusion to hallucinations and psychosis. *See HUMAN RIGHTS WATCH*, “Locked Up Alone: Detention Conditions and Mental Health at Guantanamo,” (June 2008), page 20; Peter Scharff Smith, “The Effects of Solitary Confinement on Prison

Inmates: A Brief History and Review of the Literature,” *Crime and Justice*, vol. 24 (2006); Lorna Rhodes, “Pathological Effects of the Super Maximum Prison,” *American Journal of Public Health*, vol. 95, no. 10 (2005); Brief of Amici Curiae Professors and Practitioners of Psychology and Psychiatry, *Wilkinson v. Austin*, 545 U.S. 209 (2005); Jesenia Pizarro and Vanja Stenius, “Supermax Prisons: Their Rise, Current Practices and Effect on Inmates,” *Prison Journal*, vol. 84 (2004); Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement,” *Crime and Delinquency*, vol. 49, no. 1 (2003); INTERNATIONAL PSYCHOLOGICAL TRAUMA SYMPOSIUM, “Statement on the use and effects of solitary confinement,” Istanbul (December 9, 2007).

d. Since at least the 19th Century, the United States Supreme Court has recognized that the conditions of an inmate’s confinement can have severe effects on his ability to function. *See In re Medley*, 134 U.S. 160, 168 (1890)(reviewing the history of solitary confinement, and noting that it could cause prisoners to become “violently insane,” to commit suicide, and to “not recover sufficient mental capacity to be of any subsequent service to the community”). This recognition has continued in the courts to the present day.

e. The Ninth Circuit cited to the opinions of two psychiatric experts that the conditions of isolation in maximum security facilities on death row “can cause psychological decompensation to the point that individuals may become incompetent.” *Miller ex rel Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000); *see also Comer v. Stewart*, 215 F.3d 910 (9th Cir. 2000); *citing Hoptowit v. Ray*, 682 F.2d 1237, 1257-58 (9th Cir. 1982)(“The deprivation of nearly all fresh air and light, particularly when coupled with the guard's control over the window and the electric light, creates an

extreme hazard to the physical and mental well being of the prisoner."); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2nd Cir. 1972)("We cannot approve of threatening an inmate's sanity and severing his contacts with reality by placing him in a dark cell almost continuously day and night."); *McClary v. Kelly*, 4 F.Supp.2d 195, 205-210 (W.D.N.Y. 1998)(psychological harm can be caused by isolation); *Touissant v. McCarthy*, 597 F.Supp. 1388, 1397-98, *reversed in part*, 801 F.2d 1080 (9th Cir. 1986)(Noting the "unrelenting nerve-racking din that fills the segregation units" and causes a "profound impact on lockup inmates.").

f. In a series of rulings beginning with *Comer v. Stewart* and ending with an *en banc* decision, *Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007),⁶ the Ninth Circuit remanded a case to the district court for an evidentiary hearing on the defendant's competency to withdraw his habeas claim. The defendant had spent twelve years in a sensory deprivation unit. *See Comer*, 215 F.3d at 916. In completing its competency evaluation, the district court "allowed both parties to have access to every place [the defendant] had lived while incarcerated." *Comer*, 463 F.3d at 942. In addition, the "independent psychiatric expert appointed by the District Court toured the prison." *Comer*, 480 F.3d at 965.

g. In *Groseclose ex rel. Harries v. Dutton* the court found that the defendant was not competent to waive his post conviction remedies challenging his conviction and death sentence after reviewing extrinsic evidence regarding his conditions of confinement, including that one of the examining psychiatrists saw the defendant's cell

⁶ The ruling between the two cases cited, *Comer v. Schriro*, 463 F.3d 934 (9th Cir. 2006), a panel decision was replaced by the *en banc* decision cited, *supra*. *See also Comer v. Stewart*, 471 F.3d 1359 (9th Cir. 2006)(order granting *en banc* hearing). The dissent in the *en banc* decision adopted the panel decision in full. *See Comer*, 480 F.3d at 966.

and living conditions and found that his “waiver decision indicated a suicidal intent that renders him incompetent.” 594 F.Supp. 949, 961 (D.C. Tenn. 1984). The court held that “the conditions of confinement are so adverse that they have caused [the defendant] to waive his post-conviction remedies involuntarily.” *Id.*

II. THE ORDER SOUGHT BY THE DEFENSE IS VITAL TO A DETERMINATION OF WHETHER MR. BIN AL SHIBH IS INCOMPETENT, OR IF HE SUFFERS FROM FRAGILE COMPETENCE AND WILL DECOMPENSATE DUE TO THE STRESS OF A CAPITAL TRIAL.

a. The defense respectfully submits that its own inquiry regarding competency cannot be adequately performed without a thorough evaluation of the conditions of his confinement. In addition to the ubiquitous legal authority and psychological literature cited, *supra*, the defense makes this submission upon consultation with [REDACTED], a recognized expert⁷ on this very issue. It is [REDACTED] expert opinion that, “[a]n assessment of the nature and effect of Mr. bin al Shibh’s conditions of confinement, and the degree to which they may have influenced the course of his illness is essential to an informed conclusion regarding his diagnostic assessment, treatment, and prognosis.” *See Declaration of [REDACTED]*, pg. 16. [Attachment A]. This is particularly crucial for a pre-trial detainee such as Mr. bin al Shibh, who manifests [REDACTED] [REDACTED] [REDACTED] [REDACTED]. “[A] thorough and accurate evaluation of the conditions of confinement is essential to rendering a valid diagnosis(es) of any mental disease or

⁷ [REDACTED]

defect, determining the impact of such disorder(s) on adjudicative functioning, and designing and following an effective treatment plan.” *Id.* at 9.

b. In addition, the government would suffer no prejudice if the Commission were to grant the defense the relief it seeks. All defense counsel have the prerequisite security clearances and “need to know.” Further, detailed defense counsels were previously “read in” to the detention program by JTF-GTMO in April 2008.

Additionally, it must be noted that [REDACTED], the doctors assigned to conduct the 706 Inquiry, were permitted the access to Mr. bin al Shibh’s detention cell less than one day after their request was submitted, The defense should be provided the same. Further, if the government has any security concerns for such access, the defense reaffirms its willingness to do all that is required to minimize any security risk, including but not limited to, completion of prerequisite force protection brief(s), indoctrination and “read-ons” for any additional Special Access Programs, and wearing any appropriate protective gear while on the cell block. *See Attachment B*, pg. 2.

c. Pending before the Commission is the defense motion to compel the appointment and funding of Xavier Amador, M.A., Ph.D., as an expert consultant. *See D-017*. Should the Commission order the appointment of Dr. Amador as a defense expert consultant, the defense respectfully requests that Dr. Amador also be allowed to view and inspect the conditions of Mr. bin al Shibh’s confinement. Without such an examination, the expert doing a competency examination would be acting in the dark, and can only speculate as to how the severe conditions under which Mr. bin Al Shibh is being held are affecting his functioning. Making a determination as to a defendant’s competency is a difficult judgment to make in any circumstance. Forcing a mental health expert to make

such a determination with one hand tied behind his back makes it impossible. This fact was precisely demonstrated by [REDACTED], the government's appointed physician for the 706 Inquiry, when he sought an order from the military judge to be given the very same access the defense seeks.

d. Even if the 706 Inquiry determines Mr. bin Al Shibh to be competent, the defense will need to utilize its expert to conduct a determination as to the fragility of that competence and whether it can withstand the very high stress of a capital trial.

Knowledge regarding his conditions of confinement is imperative in making this decision. "[A]n inmate's conditions of confinement may significantly influence the nature, severity and course of disabling psychiatric symptoms, and may even potentiate the symptoms and cause onset of mental disorders to which the individual was genetically or psychologically at risk." *See Declaration* of Dr. Stewart, pg. 9

[**Attachment A**]. When mental health problems are present, they may deteriorate based upon the conditions of confinement. As the Northern District of California stated:

Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases deteriorate to develop psychiatric disturbances. These include perceptual distortions, hallucinations, hyper-responsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control.

Madrid v. Gomez, 889 F.Supp. 1146, 1230 (N.D. Cal. 1995).

7. **Request for Oral Argument:** As it is entitled, the defense respectfully requests oral argument to allow for thorough consideration of the issues raised by this motion. *See R.M.C. 905(h)*. Specifically, the defense respectfully requests the opportunity to argue this motion during the hearing scheduled for 22-24 September 2008.

8. **Witness Request:** None

9. **Conference with Opposing Counsel:** Pursuant to Military Commissions Rules of Court, Rule 3.3, the defense conferred with the government regarding this motion on 11 September 2008. The government opposes the requested relief.

10. **Attachments:**

- A. Declaration of [REDACTED], dated 11 September 2008
- B. Memorandum for JTF-GTMO, dated 13 August 2008
- C. Emails of [REDACTED], dated 14 August 2008

Respectfully submitted,

By: *Richard E.N. Federico*

CDR Suzanne M. Lachelier, JAGC, USNR

LT Richard E.N. Federico, JAGC, USN

Detailed Defense Counsels for

Mr. Ramzi bin al Shibh

Office of the Chief Defense Counsel

Office of the Military Commissions
[REDACTED]

Mr. Thomas A. Durkin

Civilian Counsel of Record for

Mr. Ramzi bin al Shibh

Durkin & Roberts
[REDACTED]